

Appeal when reviewing the award of a judge in a running-down case. That principle has been well stated by Lord Wright in his speech at pages 616-617 in *Davies v. Powell Duffryn Associated Collieries Ltd.*⁽⁴⁾:

"Where... the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer L.J. in *Flint v. Lovell*.⁽⁵⁾ In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

Thus, applying the same principle, the questions before us are — has the learned judge acted on a wrong principle, or misapprehended the facts, or has he for some reason made a wholly erroneous estimate of the value of the land? It is not enough if only there is a balance of opinion or preference one way or another; the scale must go down heavily on the ground of insufficiency against the allegedly low value put on the land by the learned judge.

Before us it was stated, first, that the learned judge was wrong in ignoring the sales of Lots 1896 and 2307 in the locality. Lot 1896 was sold on August 17, 1977, to RISDA, for \$11,790 an acre, while 10/12ths of Lot 2307 were sold on October 5, 1973, to two Malays, for \$10,000 an acre. Both these lots are Malay reservation and it was argued that the land in question, being non-reservation, should be worth more. But these two lots are nearer to Temerloh town and also smaller, rise up from road level to high ground and have water and electricity supply — all factors which tend to make them more desirable and therefore more expensive to buy. Nearness to town and smallness of size, it is well-known, tend to increase the per-acre price of land.

It was also said that the learned judge was wrong in ignoring the price paid (\$11,852 per acre) for Lot 2862, between the previous two lots and the lot in question, on March 24, 1978. But here again Lot 2862 is a small lot, being only 1 acre 3 roods and 17 poles in area, and like Lot 1896 it was sold to an organization, the Malay Teachers' Co-operative, and it might be thought that organizations have more money than individuals, and would therefore be more generous with vendors of land.

With respect it seems to us that every point made by both sides was carefully considered by the learned judge. It is unnecessary for us to deal with each of those points *seriatim* ourselves, for that would be repetitious. We would, however, mention that the land in question, though it is well-known that the Temerloh-Mentakab Bypass will eventually pass through it, changed hands two years before (on December 10, 1976) at only \$1,175 an area; that Lots 1981, 11.096 acres in area, changed hands on March 3, 1977, at \$1,988 an acre; that Lot 1982, 5.844 acres

in area, changed hands on July 13, 1976, at \$1,445 an acre; that Lot 1985, 10.9 acres in area, changed hands on July 3, 1977, at \$1,835 an acre (revalued by the Collector at \$1,927 per acre); and that all these lots are much nearer to the applicants' land than the two "comparable" lots No. 1896 and 2307 relied on by the Collector. It is also not without significance that across the way from the land in question is Lot 1987, over 11 acres in area, used as a Chinese cemetery, which, because Malaysians have an understandable aversion to being near ghosts may have a depressive effect on the value of lands in the vicinity.

It is possible that each of us, if we had been the judge at first instance, might have put on the applicants' land a value higher than the \$3,000 per acre value put on it here; but that alone is not enough to justify us interfering with Abdul Razak J.'s valuation. The scale must go down heavily against his figure on the ground of insufficiency before we can interfere. In our judgment the scale has not done so. In our judgment the learned judge has not acted on a wrong principle of law, nor misapprehended the facts, nor made a wholly erroneous estimate of the value of this land.

Accordingly we would dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Mahinder Singh & Co.*

YANG SALBIAH & ANOR. v. JAMIL BIN HARUN

[F.C. (Raja Azlan Shah C.J. (Malaya), Syed Othman & Salleh Abas F.JJ.) October 1, 1980 & January 22, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 197 of 1979]

Torts — Negligence — Injured person reduced to vegetative state — Damages — Global award not correct — Award for pain and suffering and loss of amenities — Out of pocket expenses and cost of care — Cost of future care — Loss of future earnings — Damages awarded by trial judge so inadequate as to justify intervention — Interest on damages.

Damages — Traumatic cerebral damage — Mentally retarded — Injured person reduced to vegetative state.

Practice and Procedure — Preparation of appeal record.

In this case the appellant, Yang Salbiah, was run down by a bus and became vegetative. The learned trial judge awarded a global sum of \$75,000 as general damages with the "usual" order as to interest and costs. The appellant appealed against the quantum of damages.

Held: (1) the trend of modern authorities is not towards awards of global sums but towards awards under particular heads of claim;

(2) in a case of total or near total incapacity the heads of claim for damages are (a) pain and suffering and loss of amenities; (b) out of pocket expenses up to date of trial; (c) cost of care to date of judgment with interest; (d) loss of earnings to date of judgment with interest; (e) cost of future care and (f) loss of future earnings;

(3) in this case the proper damages to be awarded under the various heads would appear to be (a) \$70,000 for pain and suffering and loss of amenities with interest; (b) \$500 for out of pocket expenses; (c) \$25,362 for cost of future care; and (d) \$33,816 for loss of future earnings;

(4) the total damages should come to \$129,178 and clearly the global sum awarded by the learned trial judge was so inadequate that the appellate court must substitute its own assessment for that of the trial judge;

(5) on principle there should be no interest on an award for future loss of earning capacity.

Cases referred to:-

- (1) *Murtadza bin Mohamed Hassan v. Chong Swee Pian* [1980] 1 M.L.J. 216.
- (2) *Jefford v. Gee* [1970] 2 Q.B. 130; [1970] 1 All E.R. 1202.
- (3) *Cookson v. Knowles* [1979] A.C. 556; [1978] 2 All E.R. 604.
- (4) *Pickett v. British Rail Engineering Ltd.* [1978] 3 W.L.R. 955; [1980] A.C. 136; [1979] 1 All E.R. 774.
- (5) *Lim Poh Choo v. Camden and Islington Area Health Authority* [1978] 3 W.L.R. 895; [1979] 3 W.L.R. 44; [1979] 2 All E.R. 910.
- (6) *Wise v. Kaye* [1962] 1 Q.B. 638; [1962] 1 All E.R. 257.
- (7) *H. West & Son Ltd. v. Shephard* [1964] A.C. 326; [1963] 2 All E.R. 625.
- (8) *Benham v. Gambling* [1941] A.C. 157; [1941] 1 All E.R. 7.
- (9) *Livingstone v. Rawyards Coal Co.* (1880) 5 App. Cas. 25, 39.
- (10) *Thompson v. Faraonio* [1979] 1 W.L.R. 1157.
- (11) *Ooi Soon Eng v. Ng Kee Lin* [1980] 1 M.L.J. 26.
- (12) *Chow Yee Wah & Anor. v. Choo Ah Pat* [1978] 2 M.L.J. 41.
- (13) *Syarikat Jengka Sdn. Bhd. v. Abdul Rashid bin Harun* [1981] 1 M.L.J. 201.

FEDERAL COURT.

R.K. Nathan for the appellant.

G. Sri Ram for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): The appellant, Yang Salbiah bt. Meor Rasdi (Salbiah) — the only appellant, despite the heading — is a very unfortunate young girl. She was run down by a bus and though the visible injuries sustained were a few abrasions and contusions, the end result was disastrous. She became, in that awful but very descriptive term, vegetative. She had in fact sustained severe traumatic cerebral damage and from being a happy normal healthy and intelligent school girl she has become a severely mentally retarded child, with very little awareness of her surroundings and no ability to respond socially or to control herself physically. She is unable to manage wilfully her bladder and her bowel functions. Born on May 10, 1968, she was at the time of the accident, a bit more than 7 years old. Four years later, just before the trial of the action at a neurological test conducted by a consultant, she was assessed at a mental age of 3 years. She is now a little better than a vegetable. Her condition is irreversible with hardly any prospects of improvement, but the poignancy of her situation is that her span of life is in no way shortened. Throughout the rest of her life — and one may reasonably expect that she will live out her normal span of life in this country — she will be unable to appreciate the world she lives in, to grow up to a gainfully employed life, or marry and bear children, otherwise to lead a normal healthy life and she will need constant care and attention and nursing.

Liability for the accident having been fully admitted by the defence, she must recover a substantial award for general damages to cover past, present and future injury and loss. Such an award is final and as remarked, "it is not susceptible to review as the future unfolds, substituting fact for estimate." The award has to be a lump sum assessed at the conclusion of the legal process.

It is perhaps for this reason that her claim in the statement of claim delivered on her behalf was merely expressed to be for general damages with the usual prayer for interest and cost. But at the conclusion of the case, her counsel descended into some particulars and submitted that the award should be for (1) pain and suffering and loss of amenities, (2) future loss and (3) nursing services. Her counsel however signally failed to lead any evidence of what this future loss would be or any evidence of the cost of the nursing services he had in mind or he was advised were available for the child. The trial judge, after hearing defendant's counsel's submission which let it be said, without disrespect, was equally of no assistance to the judge, awarded \$75,000 as general damages with the "usual" order as to interest and costs. So far from being usual, it is in fact, unusual. From his grounds of decision supplied subsequently, this sum was awarded on a global basis, because, in his view, "the general trend in cases of this sort showed an inclination towards an award of a global sum which would, however, take into account all these three cases." By the three cases, he obviously meant the three heads of claim referred to in counsel's submission.

A global award has the distinct advantage of covering a multitude of sins. It does not show where or how the judge had erred on the side of over-generosity or on the side of parsimony. But there is at least one good reason why a global sum should be discouraged.

It must be remembered that the purpose of damages is to try, so far as humanly possible, to put the victim back to the position he would have been in but for the accident. The damages must be fair, adequate and not excessive. A reasoned judgment must therefore be given by the judge, following legal principles and precedents. Other awards in other cases should normally be prayed in aid, but consideration must be given where the circumstances differ.

In *Murtadza bin Mohamed Hassan v. Chong Swee Pian*,⁽¹⁾ this court has explained that because no interest can be given on future loss, it is entirely inappropriate to make a global award which must necessarily incorporate this future loss into the past loss. Unfortunately the trial judge's attention was not drawn to this case. The explanation was evident. He gave judgment before the delivery of the Federal Court judgment. But this explanation does not quite absolve anyone from the duty to draw his attention to the case of *Jefford v. Gee*,⁽²⁾ *Cookson v. Knowles*,⁽³⁾ and *Pickett v. British Rail Engineering Ltd.*⁽⁴⁾ which are the authorities relied on for this court's judgment. If his attention had been drawn to these authorities, he would have realised that the trend of the modern

authorities is not towards awards of global sums but towards awards under particular heads of claim.

In the matter of what are the proper heads of claims in a case of total or near total incapacity, his attention should have been drawn to the House of Lords case of *Lim Poh Choo v. Camden and Islington Area Health Authority*⁽⁵⁾ which must now be regarded as the leading case on the subject. It is realised that the final words of that case were not said until June 21, 1979 and the judgment did not reach us before the case was heard. But the judgments of Bristow J. at first instance and of the Court of Appeal were published on December 1, 1978 in the *Weekly Law Reports*, [1978] 3 W.L.R. 895, months before the case was heard in the High Court. Again, if his attention had been drawn to that case, he would have been able to advise himself that in a case of total or near-total incapacity, the heads of claim for damages are: (1) pain and suffering and loss of amenities, (2) out of pocket expenses up to date of trial, (3) cost of care to date of judgment with interest, (4) loss of earnings to date of judgment with interest, (5) cost of future care and (6) loss of future earnings. And he would have then dealt with the action before him on this basis, except possibly in this particular case, loss of actual earnings.

In the House of Lords: [1979] 3 W.L.R. 44; [1979] 2 All E.R. 910, except for some matters which need not concern us here, the judgments of Bristow J. and the majority of the Court of Appeal were in the main upheld. Not only did Lord Scarman, with the concurrence of all his brethren, continue to consider the claim under these heads of claim, he also set out deliberately to restate the principles in a particularly attractive and useful way, with special reference to the more serious, often catastrophic cases of severe injuries, often affecting the mental perception of the victim. We can do no better than to turn to the speech of Lord Scarman in our task which clearly lies before us, in this appeal, to assess the proper damages to be awarded to Salbiah under the various heads and then on the aggregate to see whether it differs so much from the trial judge's own global sum that we in the exercise of our appellate jurisdiction and on well-established principles, ought to interfere.

(1) *The award for pain and suffering and loss of amenities:*

The House of Lords reaffirmed the authority of *Wise v. Kaye*⁽⁶⁾ and of *H. West & Son Ltd. v. Shephard*⁽⁷⁾ and the two rules formulated are: (1) The fact of unconsciousness does not eliminate the actuality of the deprivation of the ordinary experience and amenities of life. *Lim Poh Choo's* case in effect extends the Pickett principle to the plaintiff who is prevented from feeling his loss, not by death, but by total disablement, and is thus the logical corollary of that case. (2) If damages are awarded on a correct basis, it is of no concern to the court to consider any question as to the use that will thereafter be made of the money awarded. The House of Lords made it quite clear that damages are first and foremost for replacing what the plaintiff has lost.

Lord Scarman considered that the effect of these

two cases is twofold. "First, they draw a clear distinction between damages for pain and suffering and damages for loss of amenities. The former depend on the plaintiff's personal awareness of pain, her capacity for suffering. But the latter are awarded for the fact of deprivation, a substantial loss whether the plaintiff is aware of it or not. Secondly, they establish that the award in *Benham v. Gambling*⁽⁸⁾ (assessment in fatal cases of damages for loss of expectation of life) is not to be compared with and has no application to, damages to be awarded to a living plaintiff for loss of amenities."

On the evidence, Bristow J. found that Dr. Lim's loss of amenities of her good and useful life is total. On this finding which Lord Scarman refused to overrule, although he was referred to the medical evidence led which would suggest that Dr. Lim's awareness of her condition was greater and more sustained than the trial judge found, the Law Lord held that the award of £20,000 was not excessive under this head. He would appear to suggest that if the medical finding was otherwise, the award could be higher.

Dr. Lim was a mature woman, with professional qualifications, on the way to the top of her career as a psychiatric consultant. It may of course be argued that Salbiah had not "lived" in the way that Dr. Lim had and therefore would not have lost as much in the way of amenities and ought not therefore to be compensated with a comparable sum. On the other hand, it can also be argued that Salbiah has a longer way to go, and on the way she could and would have 'lived' in the way that Dr. Lim had if she had not suffered her catastrophic injuries and therefore her loss of amenities must be regarded as greater because of the longer life ahead of her. For ourselves, we do not consider that Salbiah's immaturity is of any great significance. She certainly has a greater awareness of her physical condition.

In all the circumstances of this case, we would award \$70,000 for pain and suffering and loss of amenities, which, on the authority of *Pickett v. British Rail Engineering Ltd.*, *supra*, should bear interest at 6% from the date of the service of the writ to the date of trial.

(2) *Out of pocket expenses and (3) Cost of care to date of judgment:*

The out of pocket expenses have been charged at \$50, travelling expenses for Salbiah and settled at the higher figure of \$500.

As for the cost of care to date of judgment, no evidence was led that this care undertaken by Salbiah's mother was other than the normal care devoted by a mother to an infant or a girl of tender years. Consequently we make no award.

(4) *Cost of future care:*

Again, no evidence was led in the High Court of the cost of future care. A submission was however made based on certain figures submitted by counsel.

It should perhaps be realised that a submission must be made on the evidence adduced in court or

on admissions agreed to by the parties and that a court can only act on such evidence and admissions. Nevertheless it must be a matter of some certainty that there must come a time when Salbiah's parents will not be able to look after her physical needs and will have to call on outside assistance which will have to be paid for. Even if it is otherwise and Salbiah's parents can look after her, they will have to be compensated for the time and money spent on such care and such compensation, in our view, must be a charge for future care.

If we are not to shirk our duty to apply the principle of law that the compensation should as nearly as possible put the party who has suffered in the same position as he would have been in if he had not sustained the wrong, a principle distilled by Lord Scarman from *Livingstone v. Rawyards Coal Co.*,⁽⁹⁾ we must do the best we can as we are enjoined by authority to do, in the circumstances of this case and the evidence or rather in the absence of it. But we must also bear in mind the facts of the accelerated payment and the availability of capital as well as income to meet the cost of care and the contingency that Salbiah may not live out her full expectation of life. She is now aged 12. In all the circumstances of the case we therefore take a multiplier of 25 years' purchase on a multiplicand of \$150 and reach a figure of \$25,362 for cost of future care.

(5) *Loss of future earnings:*

Despite the tender age of Salbiah, we have not the slightest doubt that if she had not been injured and rendered totally incapable of gainful employment, she would have, at the appropriate age, earned an income for herself. This she has now lost by reason of the tort committed on her by the respondent and for this in our view she must receive compensation.

The basis for such an award is that she should recover for her future loss "a capital sum which, after all proper deductions, will represent her loss of earnings, net after allowing for working expenses, and her cost of care, net after deducting the domestic element. A capital sum so assessed will compensate for a genuine loss and for a genuine item of additional expenditure, both of which arise from the injury she has sustained. It will not contain any element of duplication or go beyond compensation into surplus."

Unfortunately we do not have any evidence of Salbiah's social and economic background or her prospects. We have again to do the best we can and doing just that, we take what we believe to be a reasonably moderate figure of \$200 for her net monthly income and having regard to a span of a working life of, say, 25 years, having regard to her age and to the discounts earlier referred to as necessarily to be taken, we arrive at a figure of \$33,816.

On the authority of *Cookson v. Knowles*, *supra*, and of the latter case of *Thompson v. Faraonio*,⁽¹⁰⁾ on appeal from the Full Court of the Supreme Court of South Australia, in which the Privy Council held that on principle there should be no interest on an award for future loss of earning capacity, this sum shall not bear interest, nor will the sum awarded for cost of future care.

A *The total of general damages:*

In the result, the total now comes to \$129,178. Lord Scarman has made it clear that the amount of the total is quite immaterial and that if the tortfeasors are to succeed, they must show that one or more of the component items of the award are wrong. But for the purpose of this appeal, having regard to the global award made and the absence of any indication of the amount of each proper head of claim, the total serves as an indication whether the award made was so excessive or so inadequate that an appellate court ought to intervene. Clearly the global sum awarded is so inadequate that we must have no hesitation to substitute our assessment for that of the trial judge.

C It is obvious and we state this as a fact that the High Court had been labouring under a misdirection and the Federal Court met with considerable difficulties because no sufficient consideration had been given to the proper claims for damages in a case such as this and the proper assistance which a trial court must have a right to expect, was not given. But this we must also say. When the only issue is the question of general damages, there can be absolutely no justification for the inclusion in the Record of Appeal of those pages — pages 35-36, and 42 relating to special expenses and pages 39-41 relating to negligence: see *Ooi Soon Eng v. Ng Kee Lin*,⁽¹¹⁾ *Chow Yee Wah & Anor. v. Choo Ah Pat*⁽¹²⁾ and the judgment in *Syarikat Jengka Sdn. Bhd. v. Abdul Rashid bin Harun*.⁽¹³⁾

E The appeal is allowed, the award of \$129,178 will be substituted for the \$75,000 award of the High Court. The appellant shall have the costs of the appeal except for the costs of the unnecessary pages in the record referred to in the preceding paragraph. The award is to be paid to the Public Trustee to be held in trust for Salbiah.

Appeal allowed.

Solicitors: *R.K. Nathan & Co.; Sri Ram & Co.*

G **SAM WUN HOONG v. KADER IBRAMSHAH**
(F.C. (Suffian L.P., Abdul Hamid F.J. & Mohamed Azmi J.)
December 11, 1980 & January 20, 1981]
[Kuala Lumpur — Federal Court Civil Appeal No. 16 of 1980]

Tort — Negligence — Road Accident — Damages — Future Loss of earnings and loss of earning capacity — Compensation under Workmen's Compensation Ordinance — Whether relevant.

H *Damages — Leg amputation — Loss of earning and earning capacity — Future loss.*

In this case the appellant a contractor was injured in a road accident, as a result of which his right leg below the knee was amputated. The learned trial judge held that the appellant was partly to blame for the accident to the extent of 25%. On 100% liability he awarded as special damages \$2,995 for out of pocket expenses and \$25,000 for actual loss of earnings; and for general damages he awarded \$35,000 for pain and suffering and loss of amenities and \$12,000 for loss of earning capacity. These amounts were reduced by 25%. No award was made for future loss of earnings on the ground that there was insufficient evidence to make such an award. The appellant appealed against the refusal of the learned judge to make an award for loss of future earnings and also argued that the award of \$12,000 for loss of earning capacity was too low compared to the provisions of the Workmen's Compensation Ordinance for similar injury.